IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-293

GASTON COUNTY DYEING MACHINE COMPANY,

Petitioner

v.

MARVIN W. BROWN.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM CALLING THE COURT'S ATTENTION TO PERTINENT NEW MATTERS

As was noted in the Petition for Certiorari, filed in the above-entitled case, on August 21, 1972, the Court of Appeals for the Fourth Circuit ruled that the plaintiff was a proper representative of a class of black employees or prospective employees of the Company, notwithstanding that he had voluntarily resigned his employment four months before the institution of this action and does not seek reinstatement of employment with the Company. It was further pointed out in the Petition that such decision on the part of the Court of Appeals in this case is in sharp and direct conflict with the decision of the Court of Appeals for the Fifth

Circuit in *Huff v. N. D. Cass Co.*, — F. Supp. —, 4 FEP Cases 740, 4 EPD ¶7833 (N.D. Ala. 1971), aff'd. — F. 2d—, 4 FEP Cases 741, 4 EPD ¶7775 (5th Cir. 1972).

On July 18, 1972, in an order which was not available to the Petitioner until after the Petition for Certiorari was filed herein, the Court of Appeals for the Fifth Circuit granted a petition for rehearing in the *Huff* case. That Order, so far as can be determined, has not yet been printed, either in the official or unofficial reports. For the convenience of the Court, such Order is printed as an Appendix hereto.

In the growing conflict among the circuits over the crucially important question involved, the Court of Appeals for the Sixth Circuit, in *Heard v. Mueller Co.*, has now ruled precisely as the Court of Appeals for the Fifth Circuit ruled in the *Huff* case. The decision of the Court in the *Heard* case has not yet been printed in the official reports, but is unofficially reported at 4 FEP Cases 1119, and 4 EPD ¶7904.

In the *Heard* case, the Court stated:

"In deeming the motion moot, the District Court was apparently relying upon the fact that the appellant, at the time of the filing of the motion, was no longer an employee of the Mueller Company nor a member of the Steelworker bargaining unit, and therefore was not a proper representative of the class of affected employees which he sought to represent. The appellant does not complain of his discharge, nor does he seek reinstatement. The Fifth Circuit

has recently held that a discharged employee who is not entitled to reinstatement and who had no prospect of returning to work there was not a proper representative of the class of black employees or prospective employees of that company. Huff. v. N. D. Cass Co., —F. 2d—, 4 FEP Cases 741 (5th Cir. 1972). We agree with the Fifth Circuit that:

> 'If we were to remand the case to the District Court to allow [the appellant] to lead an action on behalf of a class of which he was not a member we would sanction a "sham" class action. This would not only destroy the dignity which has distinguished this type of action but it would likewise destroy the true role of the class action plaintiff.' Huff v. N. D. Cass Co., supra, at —."
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> 4 FEP Cases at 1122, 4 EPD at 6355-6356

It seems obvious that the crucial question presented in these cases will reoccur in the lower courts at a rapidly increasing rate, and that the serious uncertainties which are raised by the widening conflict among the circuits with respect to it will multiply, until the matter is resolved by a decree of this Court on review.

Respectfully submitted,
WHITEFORD S. BLAKENEY
Attorney for the Petitioner

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 71-2842

BRISCO HUFF, on behalf of himself and others similarly situated,

Plaintiff-Appellant

vs.

N. D. CASS COMPANY OF ALABAMA,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

ON PETITION FOR REHEARING AND PETITION FOR REHEARING IN BANC

(Opinion April 24, 1972, Fifth Circuit 1972, —F. 2d—)
(July 18, 1972)

Before, Brown, Chief Judge, Wisdom, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer, Simpson, Morgan, Clark, Ingraham, and Roney, Circuit Judges.*

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*Judge Gewin did not participate in the consideration of the petition for rehearing in banc.

By the Court:

A member of the Court in active service having requested a poll on the application for a rehearing in banc and a majority of the judges in active service having voted in favor of granting a rehearing in banc,

IT IS ORDERED, that the cause shall be heard by the Court in banc with oral argument on a day hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.